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SUPREME COURT OF THE UNITED STATES

October Term 1972

No. A-1185

73-132

MARY JANE FRANKLIN and
DONALD FRANKLIN - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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MARY JANE FRANKLIN and
DONALD FRANKLIN - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in this case on November 3, 1972.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals, printed in the Appendix hereto, *infra,* pp. 13-20 is reported at 490 S. W. 2d 148. The trial court, The Shelby Circuit Court, did not render an opinion.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on November 3, 1972. A timely petition for rehearing was denied and mandate issued on February 16, 1973. The order and mandate are printed in the Appendix hereto, *infra,* p. 21. The time for filing

a petition for writ of certiorari in this case was extended to and including July 16, 1973, by order of this Court dated May 30, 1973, a copy of which order is printed in the Appendix hereto, *infra*, p. 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process and equal protection by proceedings had in their absence during trial, wherein the statutory *prima facie* guilt of petitioners concerning the stolen property was conceded by stipulation, made without the knowledge or consent of petitioners?

2. Whether petitioners' constitutional rights of due process were violated by admission of certain incompetent hearsay testimony, thus depriving them of a fair and impartial trial?

3. Whether petitioner Donald Franklin was denied constitutional due process by the inference that his mere possession of marijuana was felonious, that is, for the purposes of sale or other disposal to another person?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment Fourteen of The United States Constitution provides in relevant part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes

The Kentucky Revised Statutes provide in pertinent parts as follows:

433.290 [1199] Receiving stolen property.

"Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section."

. . . . . .

217.731 Prohibited acts involving dangerous drugs.

"(1) No person shall possess any dangerous drug:

(a) For his own use except as authorized in KRS 217.721 to 217.785 and 217.995.

(b) For purposes of sale or other disposal to another person except as authorized in KRS 217.-721 to 217.785 and 217.995."

. . . . . .

217.995 Penalties for violation of KRS 217.721 to 217.785.

"(1) Any person who violates any provision of subsections (2), (3), (4), and (5) of KRS 217.731

or who possesses any dangerous drug for the purpose of sale or other disposal to another person in violation of paragraph (b) of subsection (1) of KRS 217.731 shall be guilty of a felony and shall be punished by confinement in the penitentiary for not more than five years or by a fine of not more than $5,000 or both. Subsequent offenses shall be punished by confinement in the penitentiary for not more than ten years or by a fine of not more than $10,000 or both.

. . . . . .

"(3) (a) Any person in possession for his own use of any dangerous drug in violation of paragraph (a) of subsection (1) of KRS 217.731 shall be guilty of a misdemeanor and upon conviction shall be ordered to a facility designated by the Commissioner of the Department of Mental Health where a program of treatment and rehabilitation not to exceed one year in duration shall be prescribed. . . ." (1970 S 274, § 6, eff. 6-18-70. 1968 H 347, § 4)

STATEMENT

The petitioners, who are husband and wife, were arrested following the search of their home and farm premises by State Police with a search warrant procured upon information of a confidential informer that certain stolen property was upon the premises. The search commenced on the night of October 25, 1970, and lasted through the following day. In addition to a number of items alleged to be stolen property, the police seized a quantity of marijuana, weighing ap-

proximately twelve pounds, found in a burlap feed bag hanging in a shed attached to a barn on the farm. Subsequently each of the petitioners was indicted and tried for Possession of Dangerous Drugs (Marijuana) For Purpose of Sale and for nine counts of Knowingly Receiving Stolen Property. Each petitioner was convicted on the dangerous drug charge and sentenced to the maximum punishment, to wit, $5,000 fine and 5 years confinement. Petitioner Mary Jane Franklin was convicted on two counts of knowingly receiving stolen property; petitioner Donald Franklin was convicted on eight counts of this charge. Petitioners were sentenced to one year confinement on each of such convictions. All sentences were ordered to run consecutively, whereby Donald Franklin was committed for a total of 13 years confinement and Mary Jane Franklin, a total of 7 years. (The Kentucky Court of Appeals reversed the conviction of Mary Jane on the dangerous drug charge, thus reducing her sentence to confinement to 2 years.)

A.

During the conduct of the trial, out of the presence of the petitioners, counsel then representing petitioners agreed with the prosecution to the following stipulation:

> "It is stipulated that the people would testify that the property found that will be testified to from the named breakins was found on the Franklin property, that its' value was over $100.00, that it

was identified and was the property of the people who lost it in the breakin, to wit: it was stolen property." (TE 62, 63).

This stipulation, made in chambers, was not announced in open court and was, in fact made and entered into without the presence, knowledge or consent of the petitioners. The question of violation of due process assured by the Fourteenth Amendment concerning the above was raised by way of an assignment of error in petitioners' appeal brief and reply brief to the Kentucky Court of Appeals. Therein the petitioners contend that the presence of the defendant at every stage of trial on a felony charge is an essential condition of due process; that this stipulation concerns essential elements of proof of the prosecution's case and constituted a vital part of the proceedings. The pertinent portions are printed in the Appendix hereto, *infra,* pp. 23-24.

The Kentucky Court of Appeals held that the stipulation made by counsel did not violate any constitutional rights. (See the court's opinion, Appendix hereto, *infra,* pp. 25-30).

B.

Hearsay testimony, interjected by prosecution witness Trooper Slone to the effect that he had been told by Jack Johnson that said Johnson had been told by one Pem Guthrie (at that time deceased) that Donald Franklin had solicited the said Guthrie for the sale of marijuana, was highly prejudicial to the petitioners'

case. Both a motion to strike this inadmissible double hearsay testimony and admonish the jury (TE 143, 144) and to set aside the verdict and grant a new trial on this ground (TR 55) were overruled by the trial court. The question of violation of petitioners' constitutional rights of due process by this incompetent evidence was raised by way of assignment of error in the appeal brief. Relevant portions are printed in the Appendix hereto, *infra,* pp. 23-26. The Kentucky court ruled that no timely objection was made and thus the question was not before the court for review. Appendix, p. 27.

C.

No direct, competent evidence of any kind was introduced that the petitioners were in any way involved in the sale, attempted sale, or other disposal of the marijuana found by the police, or of past transactions of such nature. The only testimony in this respect was that of the two police officers to the effect that the marijuana was "processed and packaged for sale" and was in condition that it could be used. Trooper Slone testified that "You could smoke it right now", although "It could be dried a little more" (TE 89), in spite of the fact that more than six months had passed since seizure of the marijuana.

The question of the unconstitutional inference from this evidence that petitioner Donald Franklin's possession was for purposes of sale or other disposal to another person was raised by assignment of error in

the appeal brief, relevant portions printed in the Appendix hereto, *infra,* pp. 16-20. The opinion of the Kentucky court did not discuss or decide this question.

REASONS FOR GRANTING THE WRIT

1. The proceedings held out of the presence of the petitioners and the resulting stipulation, of which they had no knowledge, constituted admission of, at least, *prima facie* guilt of the charge of knowingly receiving stolen property. The Kentucky court's opinion in regard to the constitutional right of the accused to be present states:

> "The fundamental rights involved here are the right to meet one's accusers face to face, the right to cross-examine, and the right to be present before the court when important decisions are being made relating to one's liberty. We do not believe appellant was denied any of these rights." (Appendix, p. 16).

The petitioners contend that this is not only in conflict with this Court's decisions, but of previous holdings of the Kentucky court. That court has held that the presence of the defendant at every stage of trial on a felony charge is an essential condition of due process, guaranteed by both the state constitution and the federal constitution. In *Powell* v. *Commonwealth,* Ky., 346 S. W. 2d 731 (1961), the Kentucky court stated:

> "Like the right of the defendant to be present himself, his right to the effective assistance of

> counsel is a requirement of our Bill of Rights, Section 11, Ky. Const., and the presence of both is a condition of due process of law assured by the Fourteenth Amendment to the Federal Constitution."

The Kentucky court's opinion conflicts with the following decisions of this Court:

> *Snyder* v. *Mass.*, 291 U. S. 97;
> *Schwab* v. *Berggran*, 143 U. S. 442;
> *Hopt* v. *Utah*, 110 U. S. 574.

It is noteworthy, further, that the Kentucky court stated in its opinion that "All counsel's stipulation did was to save time and avoid the delay that would have been involved in producing the witnesses." Appendix, p. 16. It is contended that the accused's right to confrontation of witnesses is a constitutionally guaranteed right and is personal and can be waived only by the defendant. True, it has been held that where an accused is represented by counsel, the latter, in the *presence* and on behalf of the accused, may make an effective waiver of the privilege of confrontation. *Cruzado* v. *Puerto Rico* (CA 1 Puerto Rico) 201 F. 2d 789. In the instant case, the petitioners were not present and were incapable of consenting to a matter of which they were not informed. It is believed that the question presented here involves denial of due process by a method which has not been specifically considered by this Court, which we believe requires full review.

2. The incompetent hearsay testimony that petitioner Donald Franklin had offered marijuana for sale

went to the very crux of the offense charged and the highly prejudicial effect of this incompetent testimony upon the jury is reflected by the jury fixing the maximum punishment, there having been no competent evidence whatever of any sale or attempted sale, or any aggravating circumstances that ordinarily would warrant the excessive punishment. In this respect, it seems clear that the petitioner was deprived of a fair and impartial trial and thus, his constitutional right of due process was violated thereby. *Collum* v. *Butler,* 421 F. 2d 1257 (7th Cir.).

3. The Kentucky statutory law, set forth above, provides that possession of marijuana for one's own use is a misdemeanor, while possession for the purposes of sale or other disposal to another person is a felony, carrying a maximum punishment of a fine of $5,000 or imprisonment for 5 years, or both. The verdict, based on the competent evidence, of the petitioner Donald Franklin's guilt of the felony offense is tantamount to an inference of such guilt from his mere possession alone. The testimony of Trooper Slone that he had never seen marijuana *for use* packaged in this manner, itself tends to negate that the marijuana was intended for sale, since the logical inference would be to presume that disposal to another person would be to a user. The fact that this marijuana was "processed", that is, as Sergeant Watson testified "crumpled and ready to be rolled and smoked", does not allow the inference, to the exclusion of every other reasonable hypothesis, that the petitioner possessed this marijuana for the purpose of sale or other disposal to

another person. This question of the unconstitutional inference from the evidence, while raised by assignment of error, was not discussed or decided by the Kentucky court's opinion. It is contended that the petitioner's conviction in this respect is not in accord with the applicable decisions of this Court. As this Court stated in *Thompson* v. *Louisville,* 362 U. S. 199, "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." An unconstitutional inference of this category is analogous to invalid statutory presumptions and inferences considered in the following cases:

Turner v. *U. S.,* 396 U. S. 398;
U. S. v. *Vasquez,* 429 F. 2d 615 (2d Cir.);
U. S. v. *Smart,* 448 F. 2d 931 (2d Cir.);
Leary v. *U. S.,* 395 U. S. 6.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petitioners' petition for a writ of certiorari should be granted.

Respectfully submitted,

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